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No. 91-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COLLEEN HAYES, NATHANIEL CALDWELL and TOM ALLISON,

Petitioners,

v.

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

PETER J. HURTGEN *
JAN H. FRENCH
MORGAN, LEWIS & BOCKIUS
5300 Southeast Financial Center
200 S. Biscayne Boulevard
Miami, Florida 33131-2339
Attorneys for Petitioners Hayes and Caldwell

GREGORY T. STEWART
NABORS, GIBLIN & NICKERSON
Barnett Bank Building
315 S. Calhoun Street, Suite 800
Tallahassee, FL 32301
Attorneys for Petitioner Allison

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit failed to apply the correct standard in determining whether the defense of qualified immunity was properly denied to public officials in connection with an alleged denial of procedural due process.

2. Whether a public official's defense of qualified immunity should be submitted to a jury when it cannot be resolved beforehand by a motion for summary judgment because of disputed material facts.

PARTIES BELOW

Petitioners Colleen Hayes and Nathaniel Caldwell were defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Petitioner Tom Allison was a defendant in the District Court. Respondents Gregg Fitzgerald Bailey and Lizzie Shirley Bailey were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals.

The other defendants in the District Court were: Board of County Commissioners of Alachua County, Florida; Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities; L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities; City of Gainesville, Florida; John Stanton Tileston, Sr.; James Strauss; Farnell Cole; Gary Brown; Charles Jerkins; Spencer Mann; and Stephen Garrahan.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Colleen Hayes, Nathaniel Caldwell and Tom Allison respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 956 F.2d 1112 (11th Cir. 1992), and is reproduced in Appendix A (App. 1a-35a). The final judgments and orders of the United States District Court for the Northern District of Florida (App. 36a-51a) are unreported.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343, Respondents Gregg Fitzgerald Bailey ("Bailey") and his wife, Lizzie Shirley Bailey, brought this suit in the District Court for the Northern District of Florida. On June 2, 1990, the District Court denied Petitioners' motion for summary judgment for qualified immunity with respect to certain procedural due process claims made by Bailey and granted summary judgment as to other defendants. On July 9, 1990, the District Court orally dismissed all claims against Petitioner Tom Allison ("Allison") on the ground of qualified immunity. The case was then tried to a jury which issued its verdict against Petitioners Nathaniel Caldwell ("Caldwell") and Colleen Hayes ("Hayes") on August 6, 1990. App. 52a-53a. Bailey appealed and Caldwell and Hayes cross-appealed to the Court of Appeals of the Eleventh Circuit.

The decision of the Court of Appeals was entered on March 31, 1992 reversing the District Court's granting of qualified immunity to Allison and affirming the District Court's denial of qualified immunity to Caldwell and Hayes with respect to certain alleged procedural due process violations. The Court of Appeals remanded the case for a new trial of Allison, Caldwell and Hayes on Bailey's post-deprivation procedural due process claims.[1]

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[1] Even though this case has been remanded for a new trial, the issues presented here are ripe for review at this time. The issues raised regarding the application of the qualified immunity doctrine, generally required to be resolved before trial, are fundamental to the further conduct of this case. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). If the Court accepts certiorari, the resulting decision could substantially alter the conduct of the trial on remand. Moreover, since the denial of a qualified immunity claim on a motion for summary judgment is a final order for purposes of appellate review (*Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)), it follows that the qualified immunity issues raised in this petition should be examined despite the Eleventh Circuit's remand to the

The Court of Appeals denied Bailey's suggestion for rehearing en banc on June 1, 1992. On June 4, 1992, Caldwell and Hayes filed with the Court of Appeals their motion for stay of mandate pending consideration of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Civil Action for Deprivation of Rights, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As the result of a state investigation into escape attempts from a county jail, Bailey, a former corrections officer with the Alachua County Department of Corrections, was arrested and suspended from his job. After criminal charges were dismissed and a state law enforcement agency investigation ended, Bailey was reinstated to his job with back pay. Upon the advice of his psychiatrist, Bailey did not return to work. Bailey then instituted this action pursuant to 42 U.S.C. § 1983 and state law against twelve defendants, including two governmental entities and twelve individuals (Hayes, Caldwell and Allison were three of the defendants), alleging that he had been deprived of certain constitutional rights.

Relevant to this petition are Bailey's allegations that Allison, Caldwell and Hayes had deprived him of em-

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District Court. *See* Stern, Gressman, Shapiro, *Supreme Court Practice*, § 4.18 (6th Ed. 1986).

ployment procedural due process at both the time of his arrest and suspension in May 1987 ("pre-deprivation") and during the period from his suspension to his reinstatement in June 1988 upon termination of a State of Florida law enforcement agency investigation ("post-deprivation"). During that period, Caldwell was the County Director of Public Safety and Hayes was the County Personnel Director. Allison was Assistant and then Acting Director of Corrections (as of July 1987) until February 1988 when he left the County's employ.

Before the opening of the trial, by order dated July 2, 1990, the District Court granted Allison, Caldwell and Hayes qualified immunity as to Bailey's procedural due process claims with respect to his arrest and suspension. App. 57a-80a. In that same order, the District Court indicated that more information was required before it could rule on the issue of post-deprivation procedural due process. Petitioners took immediate appeals pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Eleventh Circuit did not accept jurisdiction over those appeals. App. 54a-56a. As indicated by Chief Judge Tjoflat's special concurrence, the ground for denial was based on then-existing circuit precedent that the Court of Appeals lacked jurisdiction over the denial of summary judgment based on qualified immunity on certain claims if the defendants would have to go to trial on other claims.[2] Therefore, upon that interlocutory appeal, the Eleventh Circuit did not decide the merits of Petitioners' motion for summary judgment based on their defense of qualified immunity.

The case proceeded to trial. On the first day of the trial, the District Court granted Allison qualified im-

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[2] Since that decision, the Eleventh Circuit issued its en banc opinion on rehearing in *Green v. Brantley*, 941 F.2d 1146 (11th Cir. 1991), holding that the Court now has jurisdiction to hear an interlocutory appeal on the issue of qualified immunity even when the defendant will face trial on another claim arising from the same occurrence.

munity as to the remaining claims against him. At the end of Bailey's case, Caldwell and Hayes moved for a directed verdict, which was denied. At that time, the District Court explicitly refused to rule on their defense of qualified immunity. At the close of the defendants' case, the District Court directed a verdict that Bailey's arrest was legal because probable cause existed. The only remaining claims, the post-deprivation procedural due process claims, were submitted to the jury against the three remaining of the original twelve defendants—Alachua County, Caldwell and Hayes. Prior to submitting the case to the jury, the District Court again reserved the qualified immunity issue and although Caldwell and Hayes requested that the Court instruct the jury on qualified immunity, the Court refused to do so. App. 81a-82a.

On August 6, 1990, the jury reached its verdict, finding in favor of Alachua County and against Caldwell and Hayes with respect to the post-deprivation procedural due process claims in an amount in excess of two million dollars. App. 52a-53a. Thereafter, the District Court denied all parties' motions for new trial and for judgment notwithstanding the verdict. App. 36a-37a, 50a. An appeal to the Eleventh Circuit followed.

On appeal, the Eleventh Circuit upheld the District Court's decision to grant Allison, Caldwell and Hayes qualified immunity as to Bailey's pre-deprivation due process claims. *See* App. 20a-21a. With respect to one of Bailey's post-deprivation due process claims (his alleged right to a name-clearing hearing for alleged stigmatizing information in his personnel file) the Eleventh Circuit reversed the District Court's decision and ruled that Caldwell and Hayes were entitled to qualified immunity as a matter of law. *See* App. 24a-26a. However, with respect to Bailey's other post-deprivation due process claim (his alleged right to a hearing regarding his suspension during the period between his arrest (May 1987) and the dismissal of the criminal charges (November

1987) and then from the dismissal of criminal charges until his reinstatement in June 1988) the Eleventh Circuit treated the District Court's refusal to rule on Petitioners' qualified immunity defense as a rejection of that defense. *See* App. 26a. The Eleventh Circuit decided that Caldwell and Hayes were not entitled to qualified immunity and proceeded immediately to analyze the liability issue, presented as whether Caldwell and Hayes denied Bailey due process. *See* App. 27a. The Eleventh Circuit also reversed the District Court's granting of qualified immunity to Allison on his motion for summary judgment prior to trial. *See* App. 21a. The Eleventh Circuit therefore reversed the jury verdict against Caldwell and Hayes and remanded the case for a new trial of Allison, Caldwell and Hayes on Bailey's post-deprivation procedural due process claims.

Without describing the full analytical framework for determining the issue of qualified immunity, as enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Eleventh Circuit held that Caldwell and Hayes simply were not entitled to qualified immunity. The Court's discussion of the threshold question in considering qualified immunity—whether the law was clearly established at the time the public officials acted or failed to act—was limited to one sentence. With no discussion of the law of post-deprivation procedural due process "in a more particularized, and hence more relevant sense" (*Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), the Eleventh Circuit merely stated that "Bailey has shown that the law was clearly established that he was due some 'meaningful' process within a 'meaningful' time." *See* App. 27a.

The Eleventh Circuit also interpreted the District Court's failure to rule on Caldwell's and Hayes' qualified immunity defense at any point before, during or after the trial as a denial of qualified immunity. In a footnote, the Eleventh Circuit noted that the District Court did not

err in refusing to submit the issue to the jury: "This argument is contrary to the law in this circuit. *See Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). . . . We recognize, as did the panel in *Ansley*, that there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions." App. 26a, n.17 (citations omitted)

After finding that Allison, Caldwell and Hayes, were not entitled to qualified immunity, the Eleventh Circuit then determined that Bailey had shown a conflict in the evidence regarding "whether Bailey received less process than he was due as a matter of law." App. 27a. The Eleventh Circuit then found that significant prejudicial errors had been committed by the District Court during the trial. The District Court had erroneously denied the request of Caldwell and Hayes to sever the employment-related due process issues from the false arrest, false imprisonment and conspiracy issues. *See* App. 29a. The District Court also erroneously permitted a biased juror to sit on the jury and had failed to instruct the jury properly on the specification of damages the jury could consider. *See* App. 29a-34a. These errors led to the Eleventh Circuit's reversal of the jury verdict against Caldwell and Hayes and the remand for a new trial of Allison, Caldwell and Hayes on Bailey's post-deprivation procedural due process claims.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT IGNORED ESTABLISHED SUPREME COURT PRECEDENT BY FAILING TO APPLY THE CORRECT STANDARD FOR DETERMINING WHETHER PETITIONERS SHOULD BE GRANTED QUALIFIED IMMUNITY.

The Eleventh Circuit refused to decide the threshold legal question required by the Supreme Court to be decided in every qualified immunity case: was the law "clearly established"? Instead, the Eleventh Circuit in

this case relegated that legal question to the jury. Precisely the issue that the court itself must decide in this case—what process was meaningful and when it was due—was dodged by the Eleventh Circuit and erroneously sent back to the jury. Because the Eleventh Circuit failed to apply the Supreme Court's standard for determining whether public officials should be protected from liability by qualified immunity, this Court should exercise its power of supervision and correct this error of law.

In this case, the Eleventh Circuit denied qualified immunity to Petitioners without properly resolving the threshold question in this Court's qualified immunity analysis: was the law the officials were alleged to have violated "clearly established"? The issue of qualified immunity was raised by Petitioners Caldwell and Hayes many times in the District Court, which repeatedly postponed a determination without discussion, only to be overlooked by the Eleventh Circuit.

If this Court does not provide an analysis of the clearly established law in the context of this case, Caldwell and Hayes will be forced to stand trial for a *second* time without an adequate finding on their claim of qualified immunity. Such repeated exposure to trials undercuts the policy intended to be served by the qualified immunity doctrine—to avoid subjecting government officials to the distraction and inhibiting effects of trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The framework for determining whether a public official may defend herself by asserting this qualified immunity requires a two-prong inquiry. Under the first prong, the public official is immune from liability if she did not violate "clearly established law." *Harlow*, 457 U.S. at 818. The law must be clearly established at the time that the actions complained of occurred. If the trial court finds that the law was not clearly established (if there is any confusion about the state of the law at the time), the public official is qualifiedly immune. If, and

only if, the court finds that the plaintiff's clearly established rights were violated would the court then address the second prong of the inquiry: the official would still be qualifiedly immune if the official "neither knew nor should have known of the relevant legal standard." *Id.* at 819. In other words, the "objective legal reasonableness" of the official's action is assessed in light of the legal rules that were "clearly established" at the time it was taken. *Id.*

The period of claimed due process deprivation in this case begins with Bailey's lawful arrest and imprisonment on May 14, 1987 and ends with the notice of reinstatement and back pay of June 20, 1988. Of record and not disputable at this point is that he was lawfully charged with a felony and that those charges were withdrawn on November 19, 1987. He then, for the first time, requested reinstatement or a hearing, but received neither until the following June—a period of seven months from the date criminal charges were dismissed and twelve months from the date of the arrest. Petitioners claim that the law was not so clearly established then, or indeed now, that Bailey's constitutional rights to due process required them to give him a hearing during that seven or twelve month period, or be liable personally for not doing so.

The reason for the delay in reinstatement was, first, that criminal charges were pending, and then, that the Florida Department of Law Enforcement was reviewing the state attorney's file to determine whether Bailey's certificate to be a correctional officer would be revoked—without which he could not retain his job with the County. The reason for not providing him with a hearing during the initial five-month period was the pendency of the criminal trial and thereafter because Acting Corrections Director Allison felt that he could not make an effective decision concerning Bailey until the state agency concluded its investigation.

The Eleventh Circuit identified the clearly established law in this case to be that Bailey "was due some 'meaningful' process within a 'meaningful' time." *See* App.

27a. This proposition is unassailable, but is virtually "meaningless" to the qualified immunity inquiry. It is precisely because such global statements of clearly established law do not lead to proper application of the qualified immunity doctrine that this court held in *Anderson v. Creighton*, 483 U.S. 635 (1987), that the right alleged to have been violated must have been "clearly established" in a "more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640. *Anderson* requires that the law under consideration must have provided a standard clear and specific enough *under the circumstances* for a reasonable official to have known whether actions taken or decisions made were unlawful. The specificity of the standard is essential to reaching a correct conclusion on the state of the law.

The Eleventh Circuit, in fact, explicitly eschewed any responsibility to set forth the particularized due process requirements in this case. In a feat of contradictory reasoning, the Eleventh Circuit acknowledged that confusion beset any analysis of the timing of the process that might have been due Bailey, yet still found the law to be "clearly established." The Eleventh Circuit noted that "[c]onfusion has reigned" concerning whether the period of post-suspension deprivation began in May or November 1987, but then later stated that: "Fortunately, we need not affix dates to Bailey's procedural due process claims to resolve this confused issue." App. 18a. By virtue of this confusion alone, first the District Court and then the Eleventh Circuit should have held that the law was *not* clearly established in this factual context.

If a federal district court judge and three appellate judges believed that the commencement of the period of deprivation was confusing and were not able to resolve it, how can the defendants have been charged with knowledge of clear law under these circumstances? The Elev-

enth Circuit simply applied global law concerning due process in a generalized sense without regard for the facts of this case and the particularized standard required by this Court in determining whether the law was clearly established. After congratulating itself for not having "to resolve this confused issue" (App. 18a) of when Bailey's entitlement to due process begins, the Eleventh Circuit identified a number of factual issues which it stated "prohibited us from deciding whether Bailey received less process than he was due as a matter of law." App. 27a.[3] The Eleventh Circuit, therefore, ducked its responsibility to decide the legal question of whether the clearly established law required that Bailey have a hearing and has directed that issue to go to a jury. By thus jumping, or stumbling, over the threshold question of the qualified immunity inquiry, the decision of the Eleventh Circuit emphasizes the difficulty in deciding what kind of process, if any, and when it should have been afforded Bailey under the complicated circumstances confronting Petitioners during the period between Bailey's arrest and his reinstatement.

The application of a generalized procedural due process standard by the Eleventh Circuit in its one-line determination of the issue did not discharge the Court's duty. This is exactly the error which this Court flagged and warned against in *Anderson*. If courts consider only globally-expressed legal principles, such as "the right to due process is clearly established by the Due Process Clause,"

> *Harlow* would be transformed from a guarantee of immunity to a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases

[3] The Court then discussed a "fact-bound notice issue" (App. 27a) and a perceived inconsistency in the position that a hearing would have been futile and therefore was not provided versus the position that Bailey received all the process to which he was entitled under the personnel regulations. *See* App. 27a-28a.

> strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'

Anderson, 483 U.S. at 639. (citations omitted)

The Eleventh Circuit has failed to adequately consider the threshold question in this case—whether the law of procedural due process was clearly established in the more "particularized sense" required by *Anderson* in 1987 and 1988. Petitioners request that this Court exercise its supervisory power to clarify the interpretation of the qualified immunity analytical structure and provide these public officials with the qualified immunity that they have requested many times, but which has never been properly addressed by any court. Without this Court's consideration, Caldwell and Hayes will be required to stand trial for a *second* time on the issue of liability when the threshold question of their entitlement to qualified immunity has never adequately been addressed.

II. THE ELEVENTH CIRCUIT'S ENDORSEMENT OF THE VIEW THAT QUALIFIED IMMUNITY MAY NOT BE ASSERTED AT TRIAL AND MAY NOT BE SUBMITTED TO A JURY IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON THE IDENTICAL ISSUE AND IS ATTRIBUTED TO A MISAPPLICATION OF SUPREME COURT PRECEDENT.

If the Eleventh Circuit decision is allowed to stand and these public officials are tried again for allegedly denying Bailey meaningful process at a meaningful time, it is then important to resolve the issue of what the jury may be instructed about the qualified immunity defense. Therefore, this case raises an important question often confronted by district court judges when the defense of qualified immunity is asserted by public officials. As

happened in this case, a trial judge may deny an official's motion for summary judgment on the ground that issues of material fact prevent the court from deciding the question of qualified immunity as a matter of law. At that point, the judge must decide whether to permit the qualified immunity defense to survive and be asserted at trial. At the conclusion of the trial, the judge must then decide whether to instruct the jury on the issue of qualified immunity. The Circuits are split in the guidance they provide district courts in this matter of the survival of qualified immunity as a defense at trial and, ultimately, as a jury question.

When a public official asserts a qualified immunity defense, the trial court must apply the analysis provided by this Court in *Harlow v. Fitzgerald* and *Anderson v. Creighton*. The court must first determine the threshold question of whether the law governing the official's conduct was clearly established. If the court determines that the law was not clearly established, the public official is qualifiedly immune as a matter of law. If, however, the court determines that the law was clearly established at the time in question, the inquiry does not end. The court then confronts the second prong of the qualified immunity inquiry: whether a reasonable public official, in light of the clearly established law and the information possessed by that official, could have believed that the action taken was unlawful. *Anderson*, 483 U.S. at 641.[4]

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[4] There is an argument that if there exist factual issues upon which entitlement to qualified immunity turns and which must be submitted to a jury, then qualified immunity must be granted as a matter of law. This is so because jury questions exist only if reasonable people can disagree about the facts. If a jury is free to decide the facts either way, then the defendant cannot have been "plainly incompetent" or have "knowingly violated the law," to paraphrase this Court's statement in *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). To paraphrase further, this time from baseball, ties go to the defendant. As applied to this case, it is an argument that, if a jury question exists as to whether or not Petitioners denied Bailey meaningful due process at a meaningful time, Petitioners are en-

This Court has stated both in *Mitchell v. Forsyth*, and more recently in *Hunter v. Bryant*, 112 S.Ct. 534 (1991), that the policy considerations supporting the doctrine of qualified immunity militate in favor of the earliest possible resolution of the issue—preferably on a motion for summary judgment. In fact, *Mitchell* provides an interlocutory appeal mechanism for public officials who believe that an early denial of qualified immunity was erroneous. This Court's *per curiam* opinion in *Hunter* requires that if at all possible, the court should decide the issue of qualified immunity as a matter of law "long before trial." *Hunter*, 112 S.Ct. at 537.

However, if the trial court determines (after its threshold finding that the law was clearly established) that a factual dispute exists which precludes summary judgment, the Circuit Courts of Appeals are in disagreement over the next step to be taken by the trial court. As the Eleventh Circuit pointed out in this case, "there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions." App. 26a, n.17. Because of this split of authority, the Eleventh Circuit felt compelled to follow the precedential case in the Eleventh Circuit, *Ansley* v. *Heinrich*, 925 F.2d 1339 (11th Cir. 1991) and upheld the District Court's refusal to instruct the jury as to the qualified immunity defense asserted by Caldwell and Hayes. *Ansley* was an excessive use-of-force case in which police officers were found negligent, but were exonerated from a Section 1983 claim brought by a security guard who was shot by the officers. The Eleventh Circuit reviewed the opinions of other Circuits, recognized the split among the Circuits, and concluded that the trial court should not have instructed the jury on the issue of qualified immunity. 925 F.2d at 1347.

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titled to qualified immunity as a matter of law, because reasonable jurors (and therefore reasonable officials in Petitioners' positions) could believe that Bailey was not so denied.

Although the determination of qualified immunity should not routinely be placed in the hands of the jury, and as we have urged in this Petition it should be resolved in this case as a matter of law on behalf of Petitioners, there are circumstances in which fact-finding by a jury is the most appropriate method of determination. Moreover, it would be anomalous to have a court deny summary judgment because of disputed factual issues and then refuse to submit the question to a jury when there is sufficient evidence in the record for the jury to decide the question. This case is illustrative of just such a category of cases in which the qualified immunity issue may not be resolved before trial and should therefore be submitted to a jury.

In this case, the District Court instructed the jury only on the issue of Caldwell's and Hayes' potential liability for the alleged denial of process due Bailey after his arrest and suspension. The Court was asked, but refused, to instruct the jury on the settled legal principle underlying the second prong of the qualified immunity inquiry—even if there had been a violation of Bailey's constitutional rights, Caldwell and Hayes could still have been shielded from liability by qualified immunity. In other words, if there could have been a finding that these public officials, in the light of the information they possessed at the time, could reasonably have believed that their failure to provide Bailey with a hearing was not unlawful, then the officials would have been immune from liability.

In fact, this Court in *Anderson* held that a violation of a constitutional right may have occurred, but the public official involved may still be entitled to qualified immunity. This fundamental principle of the qualified immunity doctrine was reiterated in *Hunter*, a case in which the Court reversed the Ninth Circuit and granted qualified immunity to secret service agents for the arrest of a suspect for threatening the President of the United States:

> Even if we assumed *arguendo*, that they [the Secret Service agents] (*and* the magistrate) erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable even if mistaken. The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'

Id. at 537 (citing *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). (emphasis in original)

The Eleventh Circuit's view of this matter, as expressed in *Ansley*, is based on a misapplication of this Court's decision in *Mitchell v. Forsyth*.[5] *Mitchell* expands on this Court's redefinition of qualified immunity in *Harlow* by permitting public officials to appeal a denial of qualified immunity based on a finding that the law allegedly violated was clearly established. *Mitchell*, 472 U.S. at 528. However, *Mitchell* does not address the question raised here: if the trial court finds that issues of disputed fact must be resolved, does the qualified immunity defense survive a denial of summary judgment?

In a misinterpretation of *Mitchell*, the Eleventh Circuit in *Ansley* stated that "[q]ualified immunity is an affirmative defense from trial and not a defense to liability

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[5] Other circuits have also adopted the Eleventh Circuit's view that the qualified immunity defense is not available to public official defendants at trial and may not be submitted to a jury for resolution. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), *cert. denied*, 488 U.S. 823 (1988) (prison officials not entitled to qualified immunity in Section 1983 action brought as the result of death of psychiatrically disturbed prisoner); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985), *cert. dismissed*, 478 U.S. 1044 (1986) (case involving probable cause for home search and seizure remanded for new trial in part because court erred in instructing jury on qualified immunity); *Coffman v. Trickey*, 884 F.2d 1057 (8th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (prison official denied qualified immunity for depriving prisoners of due process in connection with discipline).

issues raised during trial. *See Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815. Accordingly, once the defense of qualified immunity is denied pretrial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity." *Ansley*, 925 F.2d at 1348.

By contrast, the Sixth Circuit in *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), in an explication of the *Mitchell* decision, stated that "*Mitchell* makes it clear that the immunity doctrine's protections against liability and against the various burdens of litigating insubstantial claims are conceptually distinct. *Mitchell*, 105 S. Ct. at 2816. Consequently, decisions with respect to dismissal or summary judgment, if adverse, do not preclude the interposition of the defense of immunity as a defense to liability on the merits." *Kennedy*, 797 F.2d at 300.

The Second, Fifth, Ninth and Tenth Circuits are in agreement with this second view that as the trier of fact, the jury can properly determine the reasonableness of a public official's actions after being instructed according to the *Harlow/Anderson* standard. *See Warren v. Dwyer*, 906 F.2d 71, 74 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 431 (1990) (affirmance of district court's decision to submit qualified immunity question to the jury and upholding jury instructions, because "[p]re-trial resolution of the defense . . . may be thwarted by a factual dispute. . . ."); *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989) (affirmance of district court's decision to submit qualified immunity question to jury in illegal search case); *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988) (reasonableness of police officer's action in context of qualified immunity defense was fact-specific and appropriate to be submitted to jury in warrantless arrest case).

The *Ansley* decision and the decisions of the other Circuits that have taken the same position as the Eleventh Circuit misread *Mitchell* and are in direct contradiction

to this Court's view as expressed in *Harlow*. Qualified immunity is not only immunity from trial, but first and foremost, immunity from liability. *Harlow*, 457 U.S. at 818. By taking the contrary position, the Eleventh Circuit is attempting to narrow the qualified immunity doctrine. The result is an expansion of the potential liability of public officials. The danger of this expansion of liability is most obvious in cases such as this where the facts necessary to determine the reasonableness of the action or inaction of the officials are clearly distinct from the facts required to determine liability for procedural due process violations. For example, factual questions which must be answered in connection with the second prong of the qualified immunity inquiry include such matters as what information the public officials possessed at the time the challenged action was taken, as well as the responsibilities of the officials and their connection with the violations claimed. Often, this is a credibility contest that must await resolution at trial.

If material facts remain in dispute regarding qualified immunity, the jury should be instructed that its resolution of those factual disputes will result in qualified immunity. It should be made clear to the jury that the facts pertinent to a determination of the reasonableness of the public officials' actions are different from the facts it will find regarding violation *vel non* of the plaintiff's constitutional rights. If the jury in this case is to resolve factual issues of notice to Bailey, as well as factual issues regarding Petitioners' knowledge and motivation, then the jurors should also be told that they are to consider whether Petitioners reasonably believed that Bailey's status (1) pending a criminal trial, and (2) pending the state agency investigation, obviated any need and purpose for an employment suspension hearing until the criminal proceedings and the state agency investigation had concluded. The jury should also be told that the answers to those questions determine whether defendants have

qualified immunity for denying Bailey a hearing, although perhaps mistakenly so.

Both the Fifth and Second Circuits have suggested the use of special interrogatories to ensure that the jury separates its qualified immunity fact-finding from its liability fact-finding. *Melear v. Spears*, 862 F.2d at 1187-88; *Warren v. Dwyer*, 906 F.2d at 75. In this case, the Eleventh Circuit has held that it is the jury's duty to sort out what manner of process Bailey should have received and when he should have received it. However, if factual disputes must be resolved to determine whether Allison, Caldwell and Hayes are qualifiedly immune, the jury should be charged with finding the facts necessary to determine whether they acted in good faith.

The Eleventh Circuit has chosen to interpret *Mitchell*, a case designed to provide an early opportunity to appeal a denial of qualified immunity on legal grounds, as narrowing rather than expanding the protection qualified immunity is meant to provide. The *Ansley* decision seeks to transform the decision in *Mitchell* into a limitation on that protection. To cut off the officials' right to have the jury perform its traditional and required function is directly apposite to the purpose of the doctrine. A defendant should not lose this important protection merely because a plaintiff is able to point to evidence that creates a genuine issue of material fact sufficient to defeat the defendant's summary judgment motion. A public official's protection from liability should not end there. This Court should take this opportunity to clear up the confusion spawned by the divided Circuit Court interpretations of *Mitchell*.

In addition, this Court should act now to prevent the continued narrowing of this important doctrine. The confusion wrought by the aftermath of *Mitchell* should be resolved. This case provides the ideal vehicle for such resolution because it places the split of Circuit authority squarely before the Court. The protection afforded

by qualified immunity, which is essential to the proper functioning of government, should not be narrowed to only immunity from trial. More fundamental even is the immunity from liability. In this imperfect world where public officials are charged with making difficult policy decisions and must at the same time protect the rights of individuals, those officials must make their decisions with the information they possess without fear of constant exposure to potentially enormous liability. Given the division of views in the Circuits, this Court should wait no longer to resolve this question.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PETER J. HURTGEN *
JAN H. FRENCH
MORGAN, LEWIS & BOCKIUS
5300 Southeast Financial Center
200 S. Biscayne Boulevard
Miami, Florida 33131-2339
Attorneys for Petitioners Hayes and Caldwell

GREGORY T. STEWART
NABORS, GIBLIN & NICKERSON
Barnett Bank Building
315 S. Calhoun Street, Suite 800
Tallahassee, FL 32301
Attorneys for Petitioner Allison

* Counsel of Record

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